* **HIGH COURT OF DELHI : NEW DELHI**

\+ **W.P. (C) No. 6603/2007**

Date of decision : September 10, 2007

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Jagdish Khurana ..... Petitioner
Through: Mr. Satya Mitra Garg, Advocate

versus

Union of India & Anr. ..... Respondent
Through:

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

VIPIN SANGHI, J. (Oral)

1. The Petitioner impugns the order dated 30th May 2007 passed by the Central Administrative Tribunal, Principal Bench, New Delhi, in O.A. No. 2581/2006 whereby his aforesaid O.A. has been dismissed by the Tribunal.

2. The Petitioner was awarded a major penalty of reduction in the basic pay from Rs.4600 to Rs.4000 in the pay scale of Rs.4000-6000 for a period of 5 years with cumulative effect vide order dated 30th May 2001. His departmental appeal was also rejected on 21.8.2001. The inquiry was conducted against the Petitioner on

grounds of corruption while discharging his duties as a Senior Booking Clerk after he was caught in a trap case.

3. On 13th May 2002, the Petitioner was transferred from Delhi Division to Firozpur Division alongwith his post. This was an inter divisional transfer. He challenged his transfer by filing O.A. No. 1464/2002 which was disposed of at the admission stage on 30th May 2002 permitting the Petitioner to make a representation against his transfer before the Competent Authority within a week. The same was directed to be considered and disposed of by a detailed and speaking order within two weeks, after receipt of the representation. The Tribunal directed status quo to be maintained by the Respondent in respect of the Petitioner's transfer. The Petitioner was also given liberty to again approach the Tribunal in case he was still aggrieved by the order that may be passed by the Competent Authority on his representation.

4. The Petitioner represented against his transfer on 4th June 2002 on the ground that no reasons for his inter divisional transfer had been indicated and that such a transfer could not be effected in respect of the post of Senior Booking Clerk held by him since the post had not been declared surplus nor had it been surrendered. The Respondents passed an order of 8th July 2002 keeping the Petitioner's transfer order dated 13.5.2002 in abeyance till finalisation of his representation. The representation of the Petitioner was thereafter rejected on 5th November 2002 whereupon he preferred O.A. No.

3061/2002. This OA was dismissed by the Tribunal on 30th May 2003 by a detailed order and the interim order granted in favour of the Petitioner on 28th November 2002 was vacated. All this while the Petitioner had confirmed to be posted in Delhi on account of the stay orders aforesaid passed by the Tribunal and the abeyance order passed by the Respondent.

5. The Respondent a issued periodic transfer order dated 17th May, 2005 in respect of the Petitioner to Badli Station where he joined. On 21st February 2006, the Respondent issued the order whereby the Respondent stated that on account of the dismissal of the Petitioner's O.A. No.3061/2002, whereby he had challenged his transfer to Firozpur Division, he may be spared and directed to report to DRM, Firozpur Division alongwith the post for further posting orders.

6. The Petitioner preferred yet another O.A. No. 538/2006 impugning the aforesaid transfer order, which was disposed of on 3rd May 2006 directing that the Petitioner shall file his representation within a week and the same shall be considered within two weeks in the light of the observations of the Tribunal by a reasoned and speaking order. Once again the Tribunal directed that the transfer orders shall not be given effect to till disposal of the representation.

7. The Petitioner represented once again on 9th May 2006 contending that the transfer orders dated 21.2.2006 were stigmatic and punitive. He also stated that other similarly situated employees who had vigilance cases against them, had not been subjected to inter

divisional transfer. However, the Respondent rejected the representation of the Petitioner vide order dated 4.6/7.2006.

8. The Petitioner once again challenged the transfer order dated 21.2.2006, alongwith the rejection of aforesaid representation on 4.6/7.2006 before the Tribunal by filing the O.A., wherein the impugned order has been passed, on the ground that he had already been subjected to a periodic transfer on periodical basis to Badli from Delhi in the same Division and therefore, there could not be an inter divisional transfer to Firozpur once again. When the aforesaid O.A. Came up for hearing on 11th April 2006, the Tribunal refused to grant any interim stay in respect of the transfer orders.

9. Before the Tribunal the Petitioner sought to make out a case of discrimination by citing various examples.

10. He also contended that the punishment period of 5 years under the order dated 30.5.2001 had already lapsed and therefore, his transfer is liable to be quashed in the light of the judgment of the Tribunal in the case of Rajender Singh vs. Union of India, O.A. No. 1340/2006 decided on 18.10.2006 and upheld by this Court in WP(C) No.3522/2007. He also relied on another decision of the Tribunal in Manoj V. Kumare vs. Union of India, 2002 (1) AISLJ (CAT) Mumbai 138, which held that the transfer pending in inquiry is stigmatic. He also submitted that the Respondents have not established as to what where the exigencies of services on account of which he was being subjected to inter divisional transfer. He relied on a circular dated 30th October

1998, which envisages that an order subjecting a Railway Employee to inter divisional transfer, which is normally not possible, should be passed after complying with the principles of natural justice.

11. On the other hand, the Respondents contended that they had no knowledge of the fact that O.A. No. 3061/2002 filed by the Petitioner against his inter divisional transfer to Firozpur had been dismissed and the stay against his transfer vacated and, therefore, he was given a periodical transfer to Badli on 17th May 2005. However, when the Respondent came to know about the dismissal of O.A. No.3061/2002, which had been dismissed on 30th May 2003, they issued the notice dated 21.2.2006, to spare the Petitioner and directed him to report to DRM, Firozpur Division alongwith his post for further posting.

12. The Respondent relied upon Rule 226 of the Indian Railways Establishment Code (IREC) Vol. I, read with Railway Board Letter No. E(NG)L-98/TR/11 dated 2.11.1998, according to which a Railway servant who has been serving in a mass contact area, and who has been subjected to penalty on corruption charges, should be sent on inter divisional transfer in public interest as a matter of policy. It was also contended that transfer of an employee is an incidence of service and the same can be interfered within judicial review only if it is mala fide, in violation of the Rules, or passed by an Incompetent Authority. It is not for the courts or the Tribunal to sit as an Appellate Authority over the matter of transfer and interfere with the smooth

functioning of the administration. The Respondent also contended that the present OA was hit by res-judicata, inasmuch, as issues raised in the present OA had been dealt with in O.A. No.3061/2002 which had been dismissed against the Petitioner. He also contended that the validity of the Rule 226 of the IREC Vol.I and Railway Board circular dated 30.10.1998 and 2.11.2998 had already been upheld by this court in W.P. (C) No. 3942/2006 and W.P. (C) No. 14596-97/2004.

13. The Tribunal rejected the OA filed by the Petitioner since the transfer is not only an incident but a condition of Government service. The power to make appointment includes the power to make appointment by transfer. It is for the Competent Authority to decide issues of transfer, and the court cannot interfere any such administrative decisions except in a few exceptional cases, such as incompetency of the authority effecting transfer, mala fides or breach of Statutory Rules. The Tribunal noted that in the present case, the original order of transfer was issued on 13.5.2002 i.e. within one year of the confirmation of the order of penalty by the Appellate Authority on 21.8.2001. However the said transfer was the interdicted by the orders of the Tribunal repeatedly. Consequently, the present OA was held not to be a case where the inter divisional transfer was being effected after a long laps of time from the time the penalty was inflicted upon the Petitioner. The Tribunal noted the fact that the periodic transfer to Badli was effected in good faith and without being aware of the fact that the O.A. No.3061/2002 had been dismissed by

the Tribunal on 30th May 2003.

14. Having considered the matter we are of the view that the impugned order passed by the Tribunal dismissing the Petitioner's O.A. No.2581/2006 is unimpeachable and does not call for interference in the exercise of our powers under Article 226 of the Constitution of India of judicial review. The O.A. No.3061/2002 filed by the Petitioner challenging his inter divisional transfer was disposed of on 30th May 2003 with the following observations:

> "10. Contentions put forth by the applicant is that as Rule 226 of IREC envisaged transfer on administrative exigency and no exigency of service shown, the administrative instructions in the form of Board's letter dated 2.11.1998 cannot override or being inconsistent with the statutory rules cannot be countenanced. What has been laid down in Rule 226 of IREC is an empowerment to the General Manager to effect inter-divisional transfer in administrative exigency. As no broad guide-lines have been laid down by way of Railway Board's circular dated 2.11.1998 which has been made applicable to staff in mass contact areas on being detected to be indulging in malpractices, transfer is to be resorted. This has a rational object sought to be achieved behind it, as the corrupt staff should not be kept at a particular place to perpetuate their ill motives. In so far as malpractices are concerned, the same are defined in the case of **Smt. Santosh Meena Vs. Union of India and another** (OA 1587/2002) decided on 24.1.2003 as to whether the inter-divisional transfer include the bad conduct, which is a matter of dishonesty by a conduct with a view to have illegal gains. As the applicant was admittedly in mass contact area working as Senior Booking Clerk, the malpractices with the allegation of corrupt

practices has been amply proved for being awarded the major punishment and the same was confirmed in appeal. There is no doubt that his transfer is well covered under the Board decision of the Railway Board laid down under circular dated 2.11.1998. The Division Bench in V.K. Gupta's case (supra) while discussing the import of instructions dated 2.11.1998, have made the following observations:

> "15. But while reading the instructions of the department that have been issued from time to time and reproduced above, it is obvious that the circulars of 13.4.1967 and 30.10.1998 do not provide that inter-divisional transfer would be conducted against persons who have repeatedly figured in vigilance cases but where penalty had been imposed to say that the circular of 2.11.1998 flows from the same meeting and must have the same effect would not be correct. On basis of the said circular, an exception has been drawn. Ticket Checking Staff detected to be indulging in malpractices had been taken to be an exception and it was provided that in terms of the existing instructions, such staff is required to be invariably sent on inter-divisional/inter-railway transfer as a matter of policy. The expression "invariably sent on inter-divisional/inter-railway transfer" is the colour and strength of this circular. The words, "in terms of the existing instructions" seem to be redundant. Otherwise, there was no occasion for providing for invariable transfers on inter-divisional/inter-railway basis. The said circular necessarily has to be read so as to find out the true meaning of the same. It is obvious that what was

> provided was that so far as Ticket Checking Staff detected to be indulging in malpractices is concerned, they could be transferred on inter-divisional/inter-railway basis. This becomes clear from paragraph 3 of the said circular which provides that existing policy of inter-divisional/inter-railway transfer of ticket checking staff detected to be indulging in malpractices shall continue and other staff in mass contact areas detected to be indulging in malpractices should also be transferred on inter-divisional basis. Therefore for such type of staff working with the Railways, it is not necessary that in terms of the instructions of 30.10.1998, penalties must have been imposed before conducting the transfers. The view to the contrary, therefore, so taken shall be said to be correct.

11. As regards the issue of instructions being inconsistent, it is settled by various pronouncements of the Apex Court. The administrative instructions supplementing the rules are valid as well as enforceable as per Rule 226 of IREC does not lay down or define administrative exigency. Board's letter dated 2.11.1998 which supplement the rule cannot be declared inconsistent as held by the Apex Court in **Union of India Vs. H.R. Patankar** 1984 Supp. SCC 359. I do not find any inconsistency in the Railway Board's letter with that of statutory rules.

12. Transfer is also an incidence of service and cannot be termed as penalty. There is no requirement of issuance of show-cause notice before the transfer is effected which is in the interest of the administration.

13. The Board's letter has been issued laying

> down the policy guide-lines of which vires is upheld by the decision of the Division Bench, which is binding on me. The contention put forth on issue of inconsistency of the instructions with statutory rules has already been dealt with by the Division Bench cannot be countenanced ex-facie. The instructions are in accordance with rules.
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> 14. In the result, for the foregoing reasons, as the transfer is in accordance with the rules, in a judicial review it does not lie within the jurisdiction of the Tribunal to sit as an appellate authority over it and stall the wheel of administration being run smoothly. The aforesaid observation gain support from the decision of the Apex Court in the case of **State Bank of India Vs. Anjan Sanyal,** 2001 (5) SCC 508. OA is accordingly dismissed. Interim order granted on 28.11.2002 is vacated."

15. Consequently, the applicability of Rule 226 of the IREC and the relevant Board Circular to the Petitioner's case stands conclusively established since the Petitioner accepted the order passed in O.A. No.3061/2002 and did not impugn the same any further.

16. It was the Respondent's case before the Tribunal that the said order of dismissal dated 30th May 2003 in O.A. No.3061/2002 did not come to their notice and consequently, the Petitioner continued to be retained in Delhi despite the vacation of the interim stay on his inter divisional transfer. The ground of discrimination taken by the Petitioner does not impress us since it is not stated that the case of Smt. Indira was a case of inter divisional transfer, consequent upon imposition of penalty on corruption charge in mass contact area. The

case of Shri Deepak Kumar vs. Union of India and others, O.A. No. 786/2002 also relied upon by the Petitioner, was a case of inter divisional transfer during the pendency of departmental proceedings, and not after the conclusion of departmental proceedings and imposition of penalty, as is the case of the Petitioner. The inter divisional transfer in case of Petitioner cannot be said to be stigmatic since it is the penalty order against the Petitioner which is stigmatic, and the inter divisional transfer of the Petitioner is only a consequence thereof, as permitted by law. Consequently, we accept the position that the Respondent remained unaware of the passing of the order dated 30th May, 2003 whereby OA No.3061/2002 was dismissed and the stay on the inter divisional transfer of the Petitioner vacated. Unaware of the fact of the dismissal of the aforesaid OA, periodic transfer from Delhi to Badli was given to the Petitioner.

17. We agree with the findings of the Tribunal that the inter divisional transfer of the Petitioner was in compliance of the Rules. The reliance placed by the Petitioner on the decision of this court in W.P. (C) No. 3522/2007 in ***Union of India and others vs. Shri Rajinder Singh*** decided on May 11, 2007 is of no avail, since the facts in that case were materially different from those of the present case. In Rajinder Singh (Supra) the penalty was awarded to the employee on 7th November 2003. Even though he was transferred in public interest on 19th February 2004, he was not relieved. Thereafter he was given a

periodic transfer on 17.5.2005. It was only on 11.11.2005, i.e. after over two years of order of penalty that his inter divisional transfer was effected. It was on account of the belated inter divisional transfer, effected more than two years after the imposition of penalty, and also on account of the fact that the Tribunal while quashing the inter divisional transfer observed that he may be given a post where he does not have any mass or public contact, that this, court dismissed the writ petition filed by the Union of India. It is not the Petitioner's case that he brought the order of dismissal of O.A. No.3061/2002 to the notice of the Respondent at an earlier stage, or that there was any other material available on record to show that the Competent Authority was in fact aware of passing of the order dated 30th May 2003 soon after it was passed and that the authority consciously decided to continue with the services of the Petitioner in Delhi even after being aware of the order passed in O.A. No.3061/2002 dated 30.5.2003.

18. In our view, the Petitioner cannot be permitted to take advantage of the fact that his inter divisional transfer order passed was back on 13th May, 2002 could not be given effect to due to the repeated stays obtained by him by filing one Original Application application after another, and the fact that the Respondent remained in the dark about the dismissal of OA No.3061/2002 on 30thy May, 2003. The inter divisional transfer in such cases has a purpose to

serve, as noted herein above, and though it should have been given effect to earlier, the same did not happen due to the sequence of facts noted herein above. In our view, its better late than never.

19. In view of our aforesaid discussion, we dismiss this writ petition since the order of the Tribunal does not call for any interference. We leave the parties to bear their own costs.

VIPIN SANGHI, J

A.K.SIKRI, J

September 10, 2007
P.K. BABBAR